Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

CHRISTINE SOLEM,

Petitioner,

v.

J. CARLTON COURTER, III, COMMISSIONER OF AGRICULTURE AND CONSUMER SERVICES, VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

The State of Virginia has applied § 3.1-884.22 of the "Virginia Meat and Poultry Products Inspection Act" (which prohibits the slaughter and sale of meat at establishments preparing such articles solely for intrastate commerce, unless such meat is inspected and in compliance with the requirements of the Act) to prohibit occasional, unsolicited, on-farm sales to an individual, for his own consumption, of excess meat from a farmer's own animals, which have been raised, killed and processed at the farm.

The Questions Presented are:

(1) Whether the police power of the State to regulate should extend to include the above described sales, or is this an unreasonable violation of liberty of contract and personal property rights protected by the Fourteenth Amendment Due Process Clause.

(2) Whether the small diversified farmer, dependent on the sum of all such occasional sales of agricultural products, has unreasonably been denied his right to make a living from his land under the same Fourteenth Amendment Clause above.

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IN THE SUPREME COURT OF THE UNITED STATES

CHRISTINE SOLEM,
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VIRGINIA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Christine Solem respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.,infra, 1-2) is unreported. The opinion of the district court (App., infra, 3-9 is also unreported.

JURISDICTION

The court of appeals entered its judgment on March 20, 2000 (App., infra, 1). A petition for rehearing and rehearing en banc was denied May 2, 2000 (App., infra, 12).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The constitutional provision involved is Section 1 of the Fourteenth Amendment, the Due Process Clause, "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

2. The statutory provision involved is the "Virginia Meat and Poultry Products Inspection Act "of the Code of Virginia (App., infra, 13-40), particularly §3.1-884.22(1)(a) and (b) (App., infra, 26).

STATEMENT OF THE CASE

Since 1974 Petitioner/Solem has owned a ten-acre farm which produces market vegetables and upon which she keeps an average of 16 dairy goats for milk, cheese, butter, meat and fertilizer, and 10 chickens for eggs, meat and fertilizer. The farm produces food for Solem and provides a partial living from the land. Beginning in 1982, Solem had killed and processed on her farm several of her goats and occasionally sold the excess meat to friends and other persons at the farm at their request for their own consumption.

Threatened with prosecution by the Virginia Department of Agriculture and Consumer Services in Mach of 1990, Solem stopped selling any meat; but in the immediate past few years she has, on several occasions, bowing to her convictions and pressure from friends who

wanted the meat for their own consumption, accepted money for it.

Aware of the threat of prosecution, Solem wrote a letter dated December 1, 1998 to J. Carlton Courter, III, Commissioner of Agriculture and Consumer Services in an attempt to further clarify the Department's position with regards to their application of § 3.1-884.22 of the Code of Virginia to prohibit occasional, unsolicited, on-farm sales to an individual, for his own consumption, of excess meat from the farmer's own animals, which have been killed and processed at the farm. The Department reaffirmed its position with regards to this matter.

Petitioner/Solem filed a Complaint for Declaratory Relief in the U.S. District Court for the Western District of Virginia, Charlottesville Division on January 7, 1999. The basis for federal jurisdiction was 28 U.S.C. § 1331.

In her Complaint Solem claimed inter alia that her sales of goat meat under the circumstances described above were not a sale to the "public" and consequently bore no substantial relation to the public health and that the Defendant had arbitrarily and unreasonably denied her the right to use her land and engage in the lawful occupation of farming, since § 3.1-884.22 applied instead to articles "in commerce", the meat slaughtering business, not to occasional/incidental on-farm sales of excess meat, which are a necessary component of a small diversified farm's profitability, and are in fact interdependent with other agricultural products raised thereon. Solem argued that since her sales did not constitute sales to the "public", and since she was not in the meat slaughtering business, that her fundamental right to contract (to accept the contract offered) under these quite restricted circumstances, had been violated under the Fourteenth Amendment Due Process Clause.

Petitioner/Solem acknowledged that economic substantive due process claims face an uphill battle with the modern-day Court's penchant for the rational basis test, but she argued that the circumstances of the issue distinguished

her claim from ordinary substantive due process claims, and instead raised questions of fundamental rights demanding at least some measure of strict scrutiny by the courts.

However, employing the rational basis test, the district court granted the State's Motion to Dismiss, finding that Solem failed to state a claim on which relief may be granted.

Petitioner/Solem appealed to the U.S. Court of Appeals for the Fourth Circuit, arguing primarily that the district court not only failed to address the totality of the circumstances, but also failed to make necessary findings, i.e., whether Solem's restricted meat sales to individuals for their own consumption constituted sales to the "public", and whether or not her farm was an establishment "engaged in the meat slaughtering business." Solem insisted that a full consideration of the totality of the circumstances and issues of her Complaint would have recognized that there were sufficient questions inherent in her claim to overcome any motion to dismiss hurdles.

The U.S. Court of Appeals for the Fourth Circuit, in a per curiam opinion, found no reversible error and affirmed the reasoning of the district court. Solem petitioned for a rehearing and a rehearing en banc and both were denied without comment.

REASONS FOR GRANTING THE PETITION

I. Fundamental Freedoms Are Lost By Arbitrary Application Of Statute

It is admitted that the State has the power to protect the public health and curtail liberty of contract in the process. However, serious questions arise when that power is extended to the circumstances surrounding Petitioner/Solem's meat sales. The question is, at what point does the State's power to protect overwhelm reason and instead trample individuals' rights. Virginia's own case of

Williams v. City of Richmond, 177 Va. 477, 488, 14 S.E.2d 287, 291, 134 A.L.R. 833, 838 (1941), quoting 16 C.J.S., Constitutional Law, § 567 states,

> "When applied to substantive rights it (14th Amendment due process clause) is interpreted to mean that the government is without right to deprive a person of life, liberty, or property by an act that has no reasonable relation to any proper governmental purpose, or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power." (Emphasis Petitioner's)

The word small is not an integral component of Solem's claim, though the adjective would appropriately describe her occasional sales to such few people. The important considerations in Solem's claim are not necessarily size, but rather how the sales occur, how often, and for what reason. Whose goat meat is she selling?---the excess of her own animals. Where does the sale take place?---on Solem's own farm. Where are the goats killed and processed?---on Solem's own farm. How often do these sales occur?---occasionally. Who initiates the sale?---the individual who wants the meat. What does the individual do with the meat?---the individual eats it.

To say that the State should have the right to have its nose in such private food transactions that do not involve the public confounds the mind, especially when under the same circumstances it is perfectly legal to give the meat away.

The thrust of the "Virginia Meat and Poultry Products Inspection Act" is to protect the lives and health of people who, in the circumstances of modern industrialism, are largely beyond self-protection. The evil to be contained exists in establishments engaging in the meat slaughtering business, the movement of meat in commerce, the buying for resale, etc.

The State's application of the statute to Solem is indeed so far beyond the necessity of the case as to be an arbitrary exercise of governmental power.

II. America's Small Diversified Farmers, Now A Minority, Need Court's Help

Not too many years ago liberty of contract/substantive due process suits were examined much more readily by the courts upon claims of arbitrary or unreasonable behavior by a state. However, by the 1950's the Court's emphasis shifted towards giving greater weight to the legislative wisdom. The cases of Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421, at 423 (1952) and Williamson v. Lee Optical Co., 358 U.S. 483, at 488 (1955) make this clear. The latter case states,

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought."

BUT, Solem's farm and the circumstances under which her goat meat is sold have nothing to do with the State's "business and industrial conditions". Rather, her Complaint has to do with simple contracts between individuals--for food--from a farmer. Therefore, her claim is distinguished, and for this reason should not be brushed aside as no longer able to be reviewed by the courts. Justice demands that the normally employed rational basis test for liberty of contract/substantive due process cases bow to a certain amount of strict scrutiny here because of the particular circumstances involved.

If individuals cannot turn to the courts for help form the State's unreasonable application of laws under certain circumstances, and when no such help can be gotten from the legislature, then what is the solution?

Robert G. McCloskey, The Supreme Court Review, 1962, in his article "Economic Due Process And The Supreme Court: An Exhumation And Reburial" states on page 50,

> "Perhaps it is true that a prosperous corporation can effectively plead its case at the bar of legislative judgment by resort to publicity and direct lobbying. Economic power may be an adequate surrogate for numerical power; no tears may be shed for helpless General Electric. But the scattered individuals who are denied access to an occupation by State-enforced barriers are as impotent a minority as can be imagined."

With the growth of corporate agribusiness farms and the attendant middleman, much has been done to erode the rights of the small diversified farmer by manipulating the "wisdom" of the legislature through the use of immense, unrestricted monetary power. Corporate power in the ever-expanding food distribution system has not only controlled the drafting and passage of many laws to the corporate favor, but also the application of such laws by the agencies to the detriment of the farmer and the individual. Challenges to the application of these laws by the diversified farmer unfortunately must be raised one agricultural product at a time, given the false illusion that the instant issue is a narrow one with little widespread significance. This case concerns goat meat; it just as well could concern eggs, milk, cheese--the underlying issues are the same, and the problem is pandemic.

III. State's Unreasonable Application of Statute Kills Small Diversified Farms

Under Licenses, 37 C.J., § 70, page 216, one reads,

> "The performance of a single act, or even a number of isolated acts, pertaining to a particular business, does not constitute engaging in or carrying on such business within the meaning of a law imposing a license or tax thereon, unless an intent to engage in the business is clearly apparent."

Occasional sales of agricultural products do not throw Petitioner/Solem into the meat slaughtering business anymore than they would throw her into the retail food business. However, Solem is in the business of operating a small, lawful, diversified farm. Such farms survive economically from the combination of all the occasional sales from various farm products. If the opportunity to sell, occasionally, any of the products is taken away, the survival of the farm is in jeopardy. Animals are a part of the small farm balance as they produce fertilizer for the crops, but to reap no return from the animals other than the fertilizer destroys the farm's economic equilibrium and propels it towards extinction.

The small diversified farmer, who at one time thrived by selling all his farm products direct to a consumer at the farm, has seen that list of products dwindle over the years as the State has applied laws demanding equipment too expensive and unnecessary to produce each product on the small scale at which the farmer could sustain himself. In effect the small diversified farmer is being denied access to his chosen occupation and the right to make a living from his land.

As the small farms are squeezed out through unreasonable and oppressive regulation, individuals are denied freedom of choice to even purchase food from the farm next door. As the "old fashioned farms" give up and don the "corporate veil" in hopes of surviving, "environmental concerns" over-spill their manure lagoons and create just more havoc.

Solem's case cuts to the heart of this building food crisis. The liberty to contract for food, as long as the public is not adversely affected, is a fundamental right. If such has not been specifically established by the Court, then it should be. Mr. Justice Field came close when he stated in Powell v. Pennsylvania, 127 U.S. 678, at 690 (1887),

> "I have always supposed that the gift of life was accompanied with the right to seek and produce food, by which life can be preserved and enjoyed, in all ways not encroaching upon the rights of others. I have supposed that the right to take all measures for the support of life, which are innocent in themselves, is an element of that freedom which every American citizen claims as his birthright."

The question of whether the State of Virginia has the right to unreasonably prohibit occasional on-farm sales is imperative for the Supreme Court to answer, not only before all of the small farms are gone, but also before the liberty to go to the farm next-door and buy food, a freedom taken for granted for many years, is gone too.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2424

CHRISTINE SOLEM,
Plaintiff – Appellant,

versus

J. CARLTON COURTER, III, Commissioner of Agriculture and Consumer Services,
Defendant – Appellee.

ENTERED: MARCH 20, 2000

Appeal from the United States District Court for the Western District of Virginia at Charlottesville. Norman K. Moon, District Judge. (CA-99-2-3)

Submitted: February 22, 2000
Decided: March 20, 2000

Before WIDENER and NIEMEYER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Christine Solem, Appellant Pro Se. John Charles Wilkinson, Jr., OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Big Stone Gap, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Christine Solem appeals from the district court's order dismissing her civil action. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Solem v. Courter, No. CA-99-2-3. (W.D. Va. Sept. 20, 1999). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CHRISTINE SOLEM,

Plaintiff,

v.

J. CARLTON COURTER, III,
COMMISSIONER OF AGRICULTURE AND
CONSUMER SERVICES,
VIRGINIA DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Defendant.

CIVIL ACTION NO. 3:99CV002

OPINION

JUDGE NORMAN K. MOON

ENTERED: September 20, 1999

Defendant filed a motion to dismiss claiming that the Court lacks subject matter jurisdiction and that the plaintiff failed to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12 (b) (1) and (6), respectively. For the reasons stated below, the Court does not find that it lacks subject matter jurisdiction. However, defendant's motion to dismiss is GRANTED because the plaintiff's complaint fails to state a claim upon which relief may be granted.

MOTION TO DISMISS STANDARD

When considering a motion to dismiss under Rule 12(b)(6), this court must consider all facts and reasonable inferences which may be drawn from the face of the plaintiff's complaint to determine whether all of the required elements of the cause of action are present. Oram v. Dalton, 927 F.Supp. 180, 184 (E.D. Va. 1996) (citing Wolman v. Tose, 467 F.2d 29, 33 n.5 (4th Cir. 1972)). This means that all factual allegation in the plaintiff's complaint must be accepted as true, Estate Const. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994), and should be construed liberally. Schatz v. Rosenberg, 943 F.2d 485, 489 (4th Cir. 1991). The Court may not dismiss the complaint unless it is apparent that the plaintiff would not be entitled to relief. Id.

FACTS

Plaintiff Christine Solem, a resident of Albemarle County, Virginia, operates a small, ten-acre farm. In addition to raising vegetables for market, she also keeps an average of 16 dairy goats and 10 chickens. Since 1982, she has occasionally slaughtered and processed some of her goats for both food as personal consumption and for sale to individual members of the public.

In March of 1990, inspectors from the Virginia Department of Agriculture and Consumer Services ("Department") procured a warrant and searched the plaintiff's home for equipment related to the slaughtering and processing of goat meat. Following the inspection, the Department issued a warning letter dated April 13, 1990, informing the plaintiff that she may have been in violation of the Virginia Meat and Poultry Products Inspection Act ("Act"). See Va. Code Ann. § 3.1-884.17 through 3.1-884.36 (Michie 1994). While the Department declined to

take legal action, the letter placed the plaintiff on notice that future violations of the Act may result in legal action.

The plaintiff responded to the Department's warning via a letter dated April 19, 1990, in which she asserted her belief that she was not in violation of the Act. Subsequently, the Department informed the plaintiff that it would prosecute her unless she stopped selling uninspected goat meat. While the plaintiff initially agreed to stop, she has more recently both given away and sold excess goat meat to friends and other persons who have approached her (the plaintiff has never solicited business). Because of her more recent sales, the plaintiff sought clarification of the regulations as they applied to her and others who are similarly situated via a letter dated December 1, 1998. Eight days later, the Department's Commissioner, J. Carlton Courter, III, responded by letter that the laws and regulations concerning the sale of goat meat had not changed since the warning letter issued in April of 1990.

Plaintiff now seeks a declaration of her rights to sell uninspected goat meat pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. Specifically, plaintiff argues that the Department's enforcement of the statute against her constitutes a violation of the Due Process Clause of the 14th Amendment as well as a more generalized violation of fundamental constitutional rights.

DISCUSSION

1. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction

As an initial matter, the defendant argues that this court lacks subject matter jurisdiction. The crux of the defendant's argument is that the plaintiff has not suffered from violations of constitutional rights and that the Declaratory Judgment Act is not an independent source of federal jurisdiction. Accordingly, the defendant argues that

this Court lacks subject matter jurisdiction and should dismiss pursuant to Rule 12(b)(1).

It is true that the Declaratory Judgment Act does not provide an independent basis for subject matter jurisdiction. See Schilling v. Rogers, 363 U.S. 666, 667 (1960); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950). However, defendant's bootstrapping argument places the cart before the horse. In her complaint, the plaintiff alleges violations of the Due Process Clause, thus giving rise to jurisdiction under 28 U.S.C. §1331.[1] Whether she ultimately prevails on the merits is another story, but one that is irrelevant for a determination of whether subject matter jurisdiction exists. As an initial matter we find that it does, allowing us to proceed to defendant's primary argument for dismissal; namely, that the plaintiff has failed to state a claim upon which relief can be granted.

2. Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted

The Virginia Code offers the following concerning the slaughtering of livestock:

> No person shall, with respect to any livestock or poultry or any livestock or poultry products, (a) Slaughter any such animals or prepare any such articles which are capable of use as a human food, at any establishment preparing such articles solely for intrastate commerce, except in compliance with the requirements of this article; (b) Sell... in intrastate commerce, any such articles which (1) are capable of use as a human food, and (2) are adulterated or misbranded at the time

[1] 28 U.S.C. § 1331 states: "The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

> of such sale... [or] offer for sale...; or any articles required to be inspected under this article unless they have been so inspected and passed.

Va. Code Ann. § 3.1-884.22(1).

In advancing her claim, the plaintiff argues that application of the statute to unsolicited, small-scale, incidental on-farm sales is improper, as such sales are not sales to the public. Moreover, the plaintiff argues that application of the statute to such sales constitutes a violation of the Due Process Clause of the 14th Amendment and of fundamental constitutional rights generally.

The plaintiff's first theory fails, as her actions clearly fall within the purview of the statute. The statute does not distinguish between large and small sellers; instead, it prohibits the slaughter of animals for use as human food at any establishment that prepares food for the use solely in intrastate commerce. The Virginia statutory provision is a part of a comprehensive state and federal statutory program designed to protect the public from disease, contamination, and other public health dangers resulting from the sale of uninspected meat in intrastate and interstate commerce, respectively. See Va. Code Ann. §§ 3.1-884.17 through 3.1-884.36; 21 U.S.C.A. §§ 601 through 695 (West 1972 & supp. 1999). Both the state and federal statutory schemes encompass all slaughtering of meat for sale. See id. Whether the sale of slaughtered meat is "unsolicited" or "incidental" is itself incidental to an analysis of the statute.

An analogous claim made by the plaintiff is that her actions do not constitute intrastate commerce because her sales to friends and other unsolicited customers does not constitute commercial activity. However, courts have long defined commerce broadly. Cf. Wickard v. Filburn, 317 U.S. 111, 127-129 (1942) (consumption by farmer of home grown wheat without resorting to outside markets constitutes

basis for regulation under the Commerce Clause of the Constitution). The term commerce "comprises every species of commercial intercourse." 15A Am. Jur. 2d Commerce § 3 (1976) (citations omitted). Goat meat is a good under the Virginia Commercial Code. See Va. Code. Ann. § 8.2-105(1) (Michie 1991) ("'Goods' means all things... which are moveable at the time of identification to the contract for sale..."). Any purchaser of the goat meat, whether a friend, acquaintance, or other incidental purchaser, is a buyer under the Code. See Va. Code Ann. § 8.2-103(1)(a) ("'Buyer' means a person who buys or contracts to buy goods."). The plaintiff is a seller under the same Code. See Va. Code Ann. § 8.2-103(1)(d) ("'Seller' means a person who sells or contracts to sell goods."). Like the Virginia Meat and Poultry Products Inspection Act discussed above, the Virginia Commercial Code and the definitions contained therein does not distinguish based upon the magnitude of sales; thus, plaintiff's sale of uninspected goat meat is covered by the Act.

The plaintiff's third challenge concerns the constitutionality of the Act both facially and as applied under the Due Process Clause of the 14th Amendment. The Act neither makes suspect classifications nor forecloses any fundamental rights. Accordingly, the appropriate test is whether the means adopted in the statute is rationally related to a legitimate governmental interest. See Reno v. Flores, 507 U.S. 292, 305 (1993); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955). The protection of the public health is a legitimate public interest, and preventing the sale of uninspected meat is more than rationally related to that interest. Even if such sales are to a small number of people, the Virginia legislature has made a determination that any sales of uninspected meat is improper. Under the test outlined above, it is not for this court to superimpose its judgment for that of the Virginia legislature.

Finally, the plaintiff argues that her fundamental contracting rights have been abridged by the Act's

enforcement against her. It is true that, because of the statute, the plaintiff cannot contract to sell uninspected goat meat. However, states have the power to abridge private property and contractual rights in enacting regulations that protect the public interest. See Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949); Nebbia v. New York, 291 U.S. 502 (1934). Without such power, our nation's regulatory schemes would grind to a halt. As noted above, the purpose of the Act is to protect the public from the health dangers presented by uninspected meat. Accordingly, the Department has the power to enforce the statute against the plaintiff.

CONCLUSION

While we have found that the subject matter jurisdiction exists to hear plaintiff's claim, it is one upon which relief cannot be granted. Accordingly, this case is DISMISSED with prejudice. It is so ORDERED. The Clerk is requested to send certified copies of this Order and Memorandum to all parties and strike the case from the docket.

\s\ NORMAK K. MOON
U.S. District Judge

Sep 20 1999
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CHRISTINE SOLEM,
Plaintiff,

v.

J. CARLTON COURTER, III, COMMISSIONER OF AGRICULTURE AND CONSUMER SERVICES, VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Defendant.

CIVIL ACTION NO. 3:99CV0002

ORDER

JUDGE NORMAN K. MOON

Entered September 20, 1999

Christine Solem filed this action against J. Carlton Courter, III, Commissioner of Agriculture and Consumer Services, Virginia Department of Agriculture and Consumer Services, seeking a declaration of her rights under the Declaratory Judgment Act, 28 U.S.C. § 2201. Defendant filed a motion to dismiss pursuant to Rules 12 (b)(1) and (6) of the Federal Rules of Civil Procedure. For the reasons set forth in the attached Opinion, the defendant's motion to dismiss is GRANTED Pursuant to Rule 12 (b)(6).

The Clerk is hereby directed to send a certified copy of this Order and the attached Opinion to all counsel of record and strike the case from the docket.

\s\ NORMAN K. MOON
U.S. District Judge

Sep 20 1999
Date

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2424
CA-99-2-3

CHRISTINE SOLEM
Plaintiff – Appellant

versus

J. CARLTON COURTER, III, Commissioner of Agriculture and Consumer Services
Defendant – Appellee

Entered: May 02, 2000

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS SO ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

ARTICLE 4.1
Virginia Meat and Poultry Products Inspection Act.

§ 3.1-884.17. Name of Article. - This article may be cited as the "Virginia Meat and Poultry Products Inspection Act." (1970, c.290.)

§ 3.1-884.18 Definitions. - As used in this article, except as otherwise specified, the following terms shall have the meanings stated below:

(1) The term "Commissioner" means the Commissioner of Agriculture and Consumer Services or his delegate.

(2) The term "Board" means the Board of Agriculture and Consumer Services.

(3) The term "person" includes any individual, partnership, corporation, association, or other business unit, and any officer, agent or employee thereof. Where applicable the term shall also include the Commonwealth of Virginia or any political subdivision thereof.

(4) The term "broker" means any person engaged in the business of buying or selling livestock products or poultry products on commission, or otherwise negotiating purchases or sales of such articles other than for his own account or as an employee of another person.

(5) The term "render" means any person engaged in the business of rendering livestock or poultry carcasses, or parts of products of such carcasses, except rendering conducted under inspection or exemption under this article.

(6) The term "animal food manufacturer" means any person engaged in the business of preparing animal (including poultry) food derived wholly or in part from livestock or poultry carcasses or parts or products of such carcasses.

(7) The term "intrastate commerce" means commerce within the Commonwealth.

(8) The term "livestock" means any cattle, sheep, swine, goats, horses, mules or other equines, whether live or dead.

(9) The term "livestock product" means any carcass, part thereof, meat, or meat food product of any livestock.

(10) The term "meat food product" means any product capable of use as human food which is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep, swine, or goats, excepting products which contain meat or other portions of such carcasses only in relatively small proportion or historically have not been considered by consumers as products of the meat food industry, and which are exempted from definition as a meat food product by the Commissioner under such conditions as he may prescribe to assure that the meat or other portions of such carcass contained in such product are not adulterated and that such products are not represented as meat food products. This term as applied to food products of equines shall have a meaning comparable to that provided in this paragraph with respect to cattle, sheep, swine, and goats.

(11) The term "poultry" means any domesticated bird, whether live or dead.

(12) The term "poultry product" means any poultry carcass or part thereof; or any product which is made wholly or in part from any poultry carcass or part thereof, excepting products which contain poultry ingredients only in a relatively small proportion or historically have not been considered by consumers as products of the poultry food industry, and which are exempted by the Commissioner from definition as a poultry product under such conditions as he may prescribe to assure that the poultry ingredients in such products are not adulterated and that such products are not represented as poultry products.

(13) The term "capable of use as human food" shall apply to any livestock or poultry carcass, or part or product of any such carcass, unless it is denatured or

otherwise identified as required by regulations prescribed by the Board to deter its use as human food, or it is naturally inedible by humans.

(14) The term "prepared" means slaughtered, canned, salted, stuffed, rendered, boned, cut up, or otherwise manufactured or processed.

(15) The term "adulterated" shall apply to any livestock product or poultry product under one or more of the following circumstances:

(a) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health;

(b) If it bears or contains (by reason of administration of any substance to the livestock or poultry or otherwise) any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; or (iii) a color additive) which may, in the judgment of the Commissioner, make such article unfit for human food;

(c) If it is, in whole or in part, a raw agricultural commodity and such commodity bears or contains a pesticide chemical which is unsafe within the meaning of § 408 of the Federal Food, Drug, and Cosmetic Act;

(d) If it bears or contains any food additive which is unsafe within the meaning of § 409 of the Federal Food, Drug, and Cosmetic Act;

(e) If it bears or contains any color additive which is unsafe within the meaning of § 706 of the Federal Food, Drug, and Cosmetic Act; provided, that an article which is not otherwise deemed adulterated under subdivision (c) or (d) of this subsection or this subdivision shall nevertheless be deemed adulterated if use of the pesticide chemical, food additive, or color additive in or on

such article is prohibited by regulations of the Board in official establishments;

(f) If it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food;

(g) If it has been prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;

(h) If it is, in whole or in part, the product of an animal (including poultry) which has died otherwise than by slaughter;

(i) If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;

(j) If it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to § 409 of the Federal Food, Drug, and Cosmetic Act;

(k) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or if any substance has been substituted, wholly or in part therefor; or if damage or inferiority has been concealed in any manner; or if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is; or

(l) If it is margarine containing animal fat and any of the raw material used therein consisted in whole or in part of any filthy, putrid, or decomposed substance.

(16) The term "misbranded" shall apply to any livestock product or poultry product under one or more of the following circumstances:

(a) If its labeling is false or misleading in any particular;

(b) If it is offered for sale under the name of another food;

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and immediately thereafter, the name of the food imitated;

(d) If its container is so made, formed, or filled as to be misleading;

(e) Unless it bears a label showing

(1) the name and place of business of the manufacturer, packer, or distributor; and

(2) an accurate statement of the quantity of the product in terms of weight, measure, or numerical count; provided, that under this subdivision, exemptions as to livestock products not in containers may be established by regulations prescribed by the Board; and provided, further, that under clause (2) of this subdivision, reasonable variations may be permitted, and exemptions as to small packages may be established for livestock products or poultry products by regulations prescribed by the Board;

(f) If any word, statement, or other information required by or under authority of this article to appear on the label or other labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

(g) If it purports to be or is represented as a food for which a definition and standard of identity or composition has been prescribed by the regulations of the Board under § 3.1-884.20 unless

(1) it conforms to such definition and standard, and

(2) its label bears the name of the food specified in the definition and standard and, insofar as may be required by such regulations, the common names of

optional ingredients (other than spices, flavoring, and coloring) present in such food;

(h) If it purports to be or is represented as a food for which a standard or standards of fill of container have been prescribed by regulations of the Board under § 3.1-884.20, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard;

(i) If it is not subject to the provisions of subdivision (g) of this subsection, unless its label bears

(1) the common or usual name of the food, if any there be, and

(2) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings, and colorings may, when authorized by the Commissioner, be designated as spices, flavorings, and colorings without naming each; provided, that, to the extent that compliance with the requirements of clause (2) of this subdivision is impracticable, or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Board;

(j) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Commissioner, after consultation with the Secretary of Agriculture of the United States, determines to be, and prescribes as, necessary in order fully to inform purchasers as to its value for such uses;

(k) If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact; provided, that, to the extent that compliance with the requirements of this subparagraph (k) is impracticable, exemptions shall be established by regulations promulgated by the Board; or

(l) If it fails to bear, directly thereon and on its containers, as the Board may by regulations prescribe, the official inspection legend and establishment number of the establishment where the product was prepared, and, unrestricted by any of the foregoing, such other information as the Board may require in such regulations to assure that it will not have false or misleading labeling and that the public will be informed of the manner of handling required to maintain the article in a wholesome condition.

(17) The term "label" means a display of written, printed, or graphic matter upon any article or the immediate container (not including package liners) of any article.

(18) The term "labeling" means all labels and other written, printed, or graphic matter

(1) upon any article or any of its containers or wrappers, or

(2) accompanying such article.

(19) The term "container" or "package" means any box, can, tin, cloth, plastic, or other receptacle, wrapper, or cover.

(20) The term "shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

(21) The term "immediate container" means any consumer package; or any other container in which livestock products or poultry products, not consumer packaged, are packed.

(22) The term "Federal Meat Inspection Act" means the act so entitled approved March 4, 1907 (34 Stat. 1260), as amended by the Wholesale Meat Act (81 Stat. 584); the term "Federal Poultry Products Inspection Act" means the act so entitled approved August 28, 1957 (71 Stat. 441), as amended by the Wholesale Poultry Products Act (82 Stat. 791); and the term "federal acts" means these two federal laws.

(23) The term "Federal Food, Drug, and Cosmetic Act" means the act so entitled, approved June 25, 1938 (52

Stat. 1040), and acts amendatory thereof or supplementary thereto.

(24) The terms "pesticide chemical," "food additive," "color additive," and "raw agricultural commodity" shall have the same meanings for purposes of this article as under the Federal Food, Drug, and Cosmetic Act.

(25) The term "official mark" means the official inspection legend or any other symbol prescribed by regulations of the Board to identify the status of any article or livestock or poultry under this article.

(26) The term "official inspection legend" means any symbol prescribed by regulations of the Board showing that an article was inspected and passed in accordance with this article.

(27) The term "official certificate" means any certificate prescribed by regulations of the Board for issuance by an inspector or other person performing official functions under this article.

(28) The term "official device" means any device prescribed or authorized by the Commissioner for use in applying any official mark.

(29) The term "official establishment" means any establishment as determined by the Commissioner at which inspection of the slaughter of livestock or poultry or the preparation of livestock products or poultry products is maintained under the authority of this article.

(30) The term "inspector" means an employee or official of the Commonwealth of Virginia authorized by the Commissioner or any employee or official of the government of any city, county or other governmental subdivision of this Commonwealth, authorized by the Commissioner to perform any inspection functions under this article under an agreement between the Commissioner and such governmental subdivision.

§ 3.1-884.19 Objective of article; designation of Department of Agriculture and Consumer Services to cooperate with United States Secretary of Agriculture. - It is the objective of this article to provide for meat and poultry products inspection programs that will impose and enforce requirements with respect to intrastate operations and commerce that are at least equal to those imposed and enforced under the Federal Meat Inspection Act and the Federal Poultry Products Inspection Act with respect to operations and transactions in interstate commerce; and the Commissioner is directed to administer this article so as to accomplish this purpose. The Virginia Department of Agriculture and Consumer Services is designated as the appropriate state agency to cooperate with the Secretary of Agriculture of the United States in administration of this article.

§ 3.1-884.20. Duties of Board of Agriculture and Consumer Services. - In order to accomplish the objective stated in § 3.1-884.19, the Board:

1. Shall, by regulations, require antemortem and postmortem inspections, quarantine, segregation and reinspections with respect to the slaughter of livestock and poultry and the preparation of livestock products and poultry products at all establishments in this Commonwealth, except those exempted by the Commissioner pursuant to subdivision (9) of § 3.1-884.21, at which livestock or poultry are slaughtered or livestock products or poultry products are prepared for human food solely for distribution in intrastate commerce;

2. Shall, by regulations, require the identification of livestock and poultry for inspection purposes and the marking and labeling of livestock products or poultry products or their containers, or both, as "Virginia Inspected and Passed" if the products are found upon inspection to be not adulterated and as "Virginia Inspected and Condemned" if they are found upon inspection to be

adulterated, and the destruction for food purposes of all such condemned products under the supervision of an inspector;

3. Shall prohibit the entry into official establishments of livestock products and poultry products not prepared under federal inspection or inspection pursuant to this article and further limit the entry of such articles and other materials into such establishments under such conditions as it deems necessary to effectuate the purposes of this article;

4. Shall, by regulations, require that when livestock products and poultry products leave official establishments they shall bear directly thereon or on their containers, or both, as it may require, all information required under subdivision (16) of § 3.1-884.18; and require approval of all labeling and containers to be used for such products when sold or transported in intrastate commerce to assure that they comply with the requirements of this article;

5. Shall require the investigation of the sanitary conditions of each establishment within subdivision 1 of this section and require the Commissioner to withdraw or otherwise refuse to provide inspection service at any such establishment where the sanitary conditions are such as to render adulterated any livestock products or poultry products prepared or handled thereat;

6. Shall prescribe regulations relating to sanitation for all establishments required to have inspection under subdivision 1 of this section;

7. Shall, by regulations, require that the following classes of persons shall keep such records and for such periods as are specified in the regulations to fully and correctly disclose all transactions involved in their business, and afford to the Commissioner and his representatives, access to such places of business, an opportunity, at all reasonable times, to examine the facilities, inventory and records thereof, to copy the records, and to take reasonable samples of the inventory upon payment of the fair market

value therefor: any persons that engage in or for intrastate commerce

(i) in the business of slaughtering any livestock or poultry, or preparing, freezing, packaging or labeling, buying or selling (as brokers, wholesalers or otherwise), transporting, or storing any livestock products or poultry products for human or animal food; or

(ii) in business as renderers or in the business of buying, selling or transporting any dead, dying, disabled or diseased livestock or poultry, or parts of the carcasses of any such animals (including poultry) that died otherwise than by slaughter;

8. Shall, by regulations, prescribe the size and style of type to be used for labeling information required under this article, and definitions and standards of identity or composition or standards of fill of container, consistent with federal standards, when it deems such action appropriate for the protection of the public;

9. Shall, by regulations, prescribe conditions of storage and handling of livestock products and poultry products by persons engaged in the business of buying, selling, freezing, storing, or transporting such articles in or for intrastate commerce to assure that such articles will not be adulterated or misbranded when delivered to the consumer;

10. Shall, by regulations, require that every person engaged in business in or for intrastate commerce as a broker, renderer, animal food manufacturer, or wholesaler or public warehouseman of livestock products or poultry products, or engaged in the business of buying, selling or transporting in intrastate commerce, any dead, dying, disabled or diseased livestock or poultry or parts of the carcasses of any such animals (including poultry) that died otherwise than by slaughter shall register with the Commissioner his name and the address of each place of business at which and all trade names under which he conducts such business;

11. May adopt by reference or otherwise such provisions of the rules and regulations under the federal acts (with such changes therein as it deems appropriate to make them applicable to operations and transactions subject to this article) which shall have the same force and effect as if promulgated under this article, and promulgate such other rules and regulations it deems necessary for the efficient execution of the provisions of this article;

12. Shall promulgate rules of practice providing opportunity for hearing in connection with issuance of orders under subdivision 5 of this section or subdivision (1), (2), or (3) of § 3.1-884.21 pending issuance of a final order in any such proceeding.

§ 3.1-884.21 Powers of Commissioner of Agriculture and Consumer Services. - In order to accomplish the objective stated in § 3.1-884.19, the Commissioner may:

(1) Remove inspectors from any establishment that fails to destroy condemned products as required under subdivision 2 of § 3.1-884.20;

(2) Refuse to provide inspection service under this article with respect to any establishment for causes specified in § 401 of the Federal Meat Inspection Act or § 18 of the Federal Poultry Products Inspection Act;

(3) Order labeling and containers to be withheld from use if he determines that the labeling is false or misleading or the containers are of a misleading size or form;

(4) Require that equines be slaughtered and prepared in establishments separate from establishments where other livestock are slaughtered or their products are prepared;

(5) Appoint and prescribe the duties of such inspectors and other personnel as he deems necessary for the efficient execution of the provisions of this article;

(6) Cooperate with the Secretary of Agriculture of the United States in administration of this article to

effectuate the purposes stated in § 3.1-884.19; accept federal assistance for that purpose and spend public funds of this Commonwealth appropriated for administration of this article to pay fifty percent of the estimated total cost of the cooperative program;

(7) Recommend to the Secretary of Agriculture of the United States for appointment to the advisory committees provided for in the federal acts, such officials or employees of the Virginia Department of Agriculture and Consumer Services as the Commissioner shall designate;

(8) Serve as the representative of the Governor for consultation with said Secretary under paragraph (c) of § 301 of the Federal Meat Inspection Act and paragraph (c) of § 5 of the Federal Poultry Products Inspection Act unless the Governor selects another representative;

(9) Exempt the operations of any person from inspection or other requirements of this article if and to the extent such operations would be exempt from the corresponding requirements under the Federal Meat Inspection Act or the Federal Poultry Products Inspection Act if they were conducted in or for interstate commerce or if the Commonwealth was designated under the federal acts as one in which the federal requirements apply to intrastate commerce.

§ 3.1-884.21:1 Meat inspection regulations; Commissioner to promulgate; Board to revise. -

A. In order to accomplish the objective stated in § 3.1-884.19, the Commissioner may adopt

(i) by reference any regulation under the federal acts as it pertains to this article, amending it as necessary for intrastate applicability; and

(ii) any regulation containing provisions no less stringent than those contained in federal regulation. Such regulation adopted by the Commissioner shall be effective upon filing with the Registrar of Regulations, who shall publish the regulation as a final regulation in the

Virginia Register of Regulations. The regulation shall contain a preamble stating that the Board will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision of such regulation.

B. The Board, after giving notice in the Virginia Register of Regulations, may reconsider and revise the regulation adopted by the Commissioner. Such revised regulation shall be effective upon filing with the Registrar of Regulations, who shall publish the regulation as a final regulation in the Virginia Register of Regulations. Neither the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.) nor public participation guidelines adopted pursuant thereto shall apply to the adoption, reconsideration, or revision of any regulation adopted pursuant to this section.

§ 3.1-884.22 Prohibitions against slaughtering livestock or poultry or preparing products except in compliance with article; intrastate distribution of adulterated, misbranded or uninspected products; distributing New York dressed or similar poultry without authorization; violating regulations and orders. -

(1) No person shall, with respect to any livestock or poultry or any livestock products or poultry products:

(a) Slaughter any such animals or prepare any such articles which are capable of use as human food, at any establishment preparing such articles solely for intrastate commerce, except in compliance with the requirements of this article;

(b) Sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce, any such articles which

(1) are capable of use as human food, and

(2) are adulterated or misbranded at the time of such sale, transportation, offer for sale or transportation, or receipt for transportation; or any articles

required to be inspected under this article unless they have been so inspected and passed; or

(c) Do, with respect to any such articles which are capable of use as human food, any act while they are being transported in intrastate commerce or held for sale after such transportation, which is intended to cause or has the effect of causing such articles to be adulterated or misbranded.

(2) No person shall sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce, or from an official establishment, any slaughtered poultry from which the blood, feathers, feet, head, or viscera have not been removed in accordance with regulations promulgated by the Board except as may be authorized by such regulations.

(3) No person shall violate any provision of the regulations of the Board under subdivisions 7, 8, 9, or 10 of § 3.1-884.20 or orders of the Commissioner under subdivisions (3) and (4) of § 3.1-884.21.

§ 3.1-884.23 Prohibitions against counterfeiting, forging, unauthorized use, alteration, or destruction or failure to use or to destroy, when required, any official marks, devices, or certificates; possession of official or counterfeit devices, or products with counterfeit marks; false certification; false representation regarding inspection; similar offenses. -

(1) No brand manufacturer, printer, or other person shall cast, print, lithograph, or otherwise make any device containing any official mark or simulation thereof, or any label bearing any such mark or simulation, or any form of official certificate or simulation thereof, except as authorized by the Commissioner.

(2) No person shall:

(a) Forge any official device, mark, or certificate;

(b) Without authorization from the Commissioner, use any official device, mark, or certificate, or simulation thereof, or alter, detach, deface, or destroy any official device, mark, or certificate;

(c) Contrary to the regulations prescribed by the Board, fail to use, or to detach, deface, or destroy any official device, mark, or certificate;

(d) Knowingly possess, without promptly notifying the Commissioner or his representative, any official device or any counterfeit, simulated, forged, or improperly altered official certificate or any device or label or any carcass of any animal (including poultry), or part or product thereof, bearing any counterfeit, simulated, forged, or improperly altered official mark;

(e) Knowingly make any false statement in any shipper's certificate or other nonofficial or official certificate provided for in the regulations prescribed by the Board; or

(f) Knowingly represent that any article has been inspected and passed, or exempted, under this article when, in fact, it has, respectively, not been so inspected and passed, or exempted.

§ 3.1-884.24 Prohibitions against intrastate distribution of equine products unless so marked, products not for human food unless denatured or identified as required, dead, dying, disabled or diseased livestock or poultry or parts of their carcasses, except in accordance with regulations. -

(1) No person shall sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce, any carcasses of horses, mules, or other equines or parts of such carcasses, or the meat or meat food products thereof, unless they are plainly and conspicuously marked or labeled or otherwise identified as required by regulations prescribed by the Board to show the kinds of animals from which they were derived.

(2) No person shall buy, sell, transport, or offer for sale or transportation, or receive for transportation, in intrastate commerce, any livestock products or poultry products which are not intended for use as human food unless they are denatured or otherwise identified as required by the regulations of the Board or are naturally inedible by humans.

(3) No person engaged in the business of buying, selling, or transporting in intrastate commerce, dead, dying, disabled, or diseased animals, or any parts of the carcasses of any animals that died otherwise than by slaughter, shall buy, sell, transport, offer for sale or transportation, or receive for transportation, in such commerce, any dead, dying, disabled, or diseased livestock or poultry or the products of any such animals that died otherwise than by slaughter, unless such transaction or transportation, is made in accordance with such regulations as the Board may prescribe to assure that such animals, or the unwholesome parts or products thereof, will be prevented from being used for human food purposes.

§ 3.1-884.25 Prohibitions concerning bribery of or gifts to state employees having duties under article; assaults or interference with such employees. -

(1) Any person that shall give, pay, or offer, directly or indirectly, to any officer or employee of this Commonwealth authorized to perform any of the duties prescribed by this article or by the regulations of the Board, any money or other thing of value, with intent to influence said officer or employee in the discharge of any such duty, shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine not less than $1,000 nor more than $10,000 and by imprisonment not less than one year nor more than three years, either or both; and any officer or employee of this Commonwealth authorized to perform any of the duties prescribed by this article who shall accept any money, gift, or other thing of value from any person, given with intent to influence his official action, or

who shall receive or accept from any person engaged in intrastate commerce any gift, money, or other thing of value given with any purpose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than $1,000 nor more than $10,000 or by imprisonment not less than one year nor more than three years, either or both, in the discretion of the jury or the court trying the case without jury.

(2) Any person that forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person engaged in or on account of the performance of his official duties under this article with the intent to hinder, delay or prevent the performance of such duties shall be fined not more than $5,000 and/or be confined in a state correctional facility not less than one year nor more than three years, or be confined in jail not exceeding one year at the discretion of the jury or court trying the case without jury.

§ 3.1-884.26 Limitation of inspection to plants preparing products for human food; denaturing or identification required for other products unless naturally inedible. - Inspection shall not be provided under this article at any establishment for the slaughter of livestock or poultry or the preparation of any livestock products or poultry products which are not intended for use as human food, but such articles shall, prior to their offer for sale or transportation in intrastate commerce, unless naturally inedible by humans, be denatured or otherwise identified as prescribed by regulations of the Board to deter their use for human food.

§ 3.1-884.27 When inspection of products placed in container completed; right of access at any time to plants subject to inspection. -

(1) No inspection of products placed in any container at any official establishment shall be deemed to be

complete until the products are sealed or enclosed therein under the supervision of an inspector.

(2) For purpose of any inspection of products required by this article, inspectors authorized by the Commissioner shall have access at all times, by day or night, to every part of every establishment required to have inspection under his article, whether the establishment is operated or not.

§ 3.1-884.28 Administrative detention of violative animals and products. - Whenever any livestock product or poultry product exempted from the definition of a livestock product and from the definition of a poultry product, or any dead, dying, disabled, or diseased livestock or poultry, is found by any authorized representative of the Commissioner upon any premises where it is held for purposes of, or during or after distribution in, intrastate commerce or is otherwise subject to this article, and there is reason to believe that any such article is adulterated or misbranded and is capable of use as human food, or that it has not been inspected, in violation of the provisions of this article or of the Federal Meat Inspection Act or the Federal Poultry Products Inspection Act or the Federal Food, Drug, and Cosmetic Act, or that such article or animal has been or is intended to be distributed in violation of any such provisions, it may be detained by such representative for a period not to exceed twenty days, pending action under § 3.1-884.29 or notification of any federal authorities having jurisdiction over such article or animal, and shall not be moved by any person from the place at which it is located when so detained, until released by such representative. All official marks may be required by such representative to be removed from such article or animal before it is released unless it appears to the satisfaction of the Commissioner that the article or animal is eligible to retain such marks.

§ 3.1-884.29 Seizure and condemnation provisions.-

(1) Any livestock product or poultry product or any dead, dying, disabled, or diseased livestock or poultry that is being transported in intrastate commerce, or is otherwise subject to this article, or is held for sale in this Commonwealth after such transportation, and that

(1) is or has been prepared, sold, transported or otherwise distributed or offered or received for distribution in violation of this article, or

(2) is capable of use as human food and is adulterated or misbranded, or

(3) in any other way is in violation of this article, shall be liable to be proceeded against and seized and condemned.

At any time prior to the expiration of the twenty-day detention period provided by § 3.1-884.28, the authorized representative of the Commissioner placing an article or animal under detention shall, at the direction of the Commissioner or his authorized representative, notify the attorney for the Commonwealth for the city or county in which such detention was made in writing of said detention. Upon receiving such written notification, the attorney for the Commonwealth shall forthwith file in the name of the Commonwealth an information against the detained property in the clerk's office of the circuit court of the county, or of the corporation court, or other court of record of competent jurisdiction in the city wherein the detention was made. Upon the filing of such information, the clerk of court shall forthwith issue a warrant directing the sheriff or city sergeant, as the case may be, to seize the detained property and see to its transportation to a suitable place of storage, which if necessary, may be outside of the county or city served by the sheriff or city sergeant. Should the attorney for the Commonwealth, for any reason, fail to file such information within five days after receipt of written notice of detention of articles or animals, the same may, at any time

within thirty days thereafter be filed by the Attorney General and the proceedings thereon shall be the same as if filed by the attorney for the Commonwealth.

Such information shall allege the seizure, and set forth in general terms the grounds of forfeiture of the seized property, and shall pray that the same be condemned and sold and the proceeds disposed of according to law, and that all persons concerned or interested be cited to appear and show cause why such property should not be condemned and sold to enforce the forfeiture. After the filing of the information, the attorney for the Commonwealth shall apply to the judge of the court wherein the information was filed for a hearing on the matters contained in the information. The judge of the court shall move the matter to the head of the docket and such hearing as is prayed for by the information shall be had as soon as practical to do so.

The owner of and all persons in any manner then indebted or liable for the purchase price of the article or animal, and any person having a lien thereon, if they be known to the attorney who files the information, shall be made parties defendant thereto, and shall be served with the notice hereinafter provided for, in the manner provided by law for serving a notice, at least ten days before the day therein specified for the hearing on the information, if they be residents of this Commonwealth; and if they be unknown or nonresidents, or cannot with reasonable diligence be found in this Commonwealth, they shall be deemed sufficiently served by publication of the notice once a week for two successive weeks in some newspaper published in such county or city, or if none be published therein, then in some newspaper having general circulation therein, and a notice shall be sent by registered mail of such seizure to the last known address of the owner of such article or animal. If any such person be served by publication, then no hearing shall be had prior to the expiration of ten days from the date of the record publication of the notice.

Any person claiming to be the owner of such seized article or animal, or to hold a lien thereon, may appear at any time before final judgment of the trial court, and be made a party defendant to the information so filed, which appearance shall be in person or by answer, under oath, in which shall be clearly set forth the nature of such defendant's claim, whether as owner or as lienor, and if as owner, the right or title by which he claims to be such owner, and if lienor, the amount and character of his lien, and the evidence thereof; and in either case, such defendant shall set forth fully any reason or cause which he may have to show against the forfeiture of the article or animal.

If such article or animal is condemned, it shall, after entry of the decree, be disposed of by destruction or sale as the court may direct and the proceeds, if sold, less the court costs and fees, and storage and other proper expenses, shall be paid into the treasury of the Commonwealth, but the article or animal shall not be sold contrary to the provisions of this article, or the Federal Meat Inspection Act or the Federal Poultry Products Inspection Act, or the Federal Food, Drug, and Cosmetic Act; provided, that upon the execution and delivery of a good and sufficient bond conditioned that the article or animal shall not be sold or otherwise disposed of contrary to the provisions of this article, or the laws of the United States, the court may direct that such article or animal be delivered to a claimant thereof, who may have appeared in the proceedings, subject to such supervision by authorized representatives of the Commissioner as is necessary to insure compliance with the applicable laws. When a decree of condemnation is entered against the article or animal and it is released under bond, or destroyed, court costs and fees, and storage and other proper expenses may as the court deems just, be awarded against the person or persons, if any, intervening as claimant of the article or animal.

If a claimant shall deny for any reason that the article or animal to be condemned is subject to condemnation as

provided by this section, and shall demand a trial by jury of the issue thus made, the court shall, under proper instructions, submit the same to a jury of five, to be selected and empanelled as prescribed by law, and if such jury shall find on the issue in favor of such claimant, or if the court, trying such issue without a jury, shall so find, the judgment of the court shall be to entirely relieve the property from forfeiture, and no costs shall be taxed against such claimant.

(2) The provisions of this section shall in no way derogate from authority for condemnation or seizure conferred by other provisions of this article, or other laws.

§ 3.1-884.30 Provisions for judicial review of certain orders.. - Any order issued under subdivision (1), (2), or (3) of § 3.1-884.21 shall be final unless appealed in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.).

§ 3.1-884.31 General criminal penalties; warning letter. -

(1) Any person that violates any provisions of this article for which no other criminal penalty is provided by this article shall upon conviction be subject to confinement in jail for not more than one year, or a fine of not more than $500, or both; but if such violation involves intent to defraud, or any distribution or attempted distribution of an article that is adulterated (except as defined in subdivision (15)(k) of § 3.1-884.18) knowing the article to be adulterated, such person shall be subject to imprisonment in a state correctional facility for not less than one year, nor more than three years or a fine of not more than $10,000 or both.

(2) Nothing in this article shall be construed as requiring the Commissioner to report for prosecution or for the institution of condemnation or injunction proceedings, minor violations of this article whenever he believes that the

public interest will be adequately served by a suitable written notice of warning.

§ 3.1-884.32 Authority of Commissioner to investigate, require reports, examine documentary evidence, issue subpoenas and obtain judicial enforcement thereof, and order depositions; witness fees; compulsory testimony and immunity from prosecution; penalties for refusal to testify, false entries in reports or records, failure to file reports or related offenses; improper disclosure of information obtained under article. - The Commissioner shall also have power:

(1) To gather and compile information concerning and, to investigate from time to time the organization, business, conduct, practices, and management of any person engaged in intrastate commerce, and the relation thereof to other persons;

(2) To require, by general or special orders, persons engaged in intrastate commerce, or any class of them, or any of them, to file with the Commissioner in such form as the Commissioner may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions furnishing the Commissioner such information as he may require as to the organization, business, conduct, practices, management, and relation to other persons, of the person filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commissioner may prescribe, and shall be filed with the Commissioner within such reasonable period as the Commissioner may prescribe, unless additional time be granted in any case by the Commissioner;

(a) For the purpose of this article the Commissioner shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person being investigated or proceeded against, and may require by subpoena the attendance and testimony of witnesses and the production of

all documentary evidence of any person relating to any matter under investigation. The Commissioner or a representative designated by him may sign subpoenas and may administer oaths and affirmations, examine witnesses, and receive evidence.

(b) Such attendance of witnesses, and the production of such documentary evidence, may be required at any designated place of hearing. In case of disobedience to a subpoena, the Commissioner may invoke the aid of an appropriate court of record to require the attendance and testimony of witnesses and the production of documentary evidence.

(c) Any court of record within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Commissioner or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) The Commissioner or his designated representatives may order testimony to be taken by deposition in any proceeding or investigation pending under this article at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commissioner or his designated representative and having the power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence before the Commissioner or his designated representatives as hereinbefore provided.

(e) Witnesses summoned before the Commissioner or his designated representative shall be paid the same fees and mileage that are paid witnesses in the courts of this Commonwealth, and witnesses whose

depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for the like services in such courts.

(f) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, or other documentary evidence before the Commissioner or his designated representatives or in obedience to the subpoena of the Commissioner or his designated representative, whether such subpoena be signed or issued by him or his delegate, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this article, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him or it may tend to incriminate him or it or subject him or it to a penalty or forfeiture; but no individual shall be prosecuted or subjected to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(g) Any person that shall refuse to attend and testify or to answer any lawful inquiry, or to produce documentary evidence, if in his or its power to do so, in obedience to the subpoena of the Commissioner or his designated representative shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

(h) Any person that shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this article, or that shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any person subject

to this article or that shall willfully neglect or fail to make or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda, of all facts and transactions appertaining to the business of such person or that shall willfully remove out of the jurisdiction of this Commonwealth, or willfully mutilate, alter or by any other means falsify any documentary evidence of any person subject to this article or that shall willfully refuse to submit to the Commissioner or to any of his authorized agents, for the purpose of inspection and taking copies, any documentary evidence of any person subject to this article in his possession or within his control, shall be deemed guilty of an offense and shall be subject, upon conviction in any court of competent jurisdiction to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

(i) If any person required by this article to file any annual or special report shall fail so to do within the time fixed by the Commissioner for filing the same, and such failure shall continue for thirty days after notice of such default, such person shall forfeit to this Commonwealth the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the treasury of this Commonwealth, and shall be recoverable in a civil suit in the name of the Commonwealth brought in the city or county where the person has his or its principal office or in any city or county in which he or it shall do business. It shall be the duty of the Attorney General to prosecute for the recovery of such forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the Department of Agriculture and Consumer Services.

(j) Any officer or employee of this Commonwealth who shall make public any information obtained by the Commissioner, without his authority, unless directed by a court, shall be deemed guilty of a

misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment, not exceeding one year, or both such fine and imprisonment, in the discretion of the court.

§ 3.1-884.33 Power of injunction. - The Commissioner is authorized to apply to any court of competent jurisdiction for an injunction and such court may grant a temporary or permanent injunction restraining a person from violating or continuing the violation of any provision of this article, when the court determines that the testimony and evidence presented warrants such action, without reference to adequacy of any remedy existing at law.

§ 3.1-884.34 Limitation on applicability of article to matters regulated under federal acts. - The requirements of this article shall apply to persons, establishments, animals, and articles regulated under the Federal Meat Inspection Act or the Federal Poultry Products Inspection Act only to the extent provided for in said federal acts.

§ 3.1-884.35 Authorization for appropriations. - There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this article.

§ 3.1-884.36: Not set out.